

January 1994

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Recommended Citation

Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 B.C. Third World L.J. 43 (1994),
<https://lawdigitalcommons.bc.edu/twlj/vol14/iss1/3>

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THE MARCOS HUMAN RIGHTS LITIGATION: CAN JUSTICE BE ACHIEVED IN U.S. COURTS FOR ABUSES THAT OCCURRED ABROAD?

ELLEN L. LUTZ*

I. INTRODUCTION

Within a month of ex-Philippine President Ferdinand Marcos's arrival in the United States in February 1986, half a dozen civil lawsuits were filed against him in United States District Courts for human rights violations that occurred in the Philippines during his presidency. The lawsuits alleged that Marcos was personally responsible for summary executions; disappearances; torture; cruel, inhuman, and degrading treatment and punishment; and prolonged arbitrary detention in the Philippines between 1971 and 1986. Plaintiffs asserted jurisdiction for these suits under the Alien Tort Claims Act, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹ Plaintiffs sought compensatory and punitive damages from Marcos.

Two types of lawsuits were filed: actions on behalf of approximately thirty named individuals, and a class action on behalf of all victims of torture, disappearance, and summary execution from Marcos's declaration of martial law in September 1972 until his departure from the Philippines—approximately ten thousand persons.² Marcos

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¹ 28 U.S.C. § 1350 (1993). The handful of plaintiffs who had become naturalized United States citizens based jurisdiction on 28 U.S.C. § 1331 (1993) (federal question jurisdiction) or 28 U.S.C. § 1332 (1993) (diversity jurisdiction).

² See, e.g., *Trajano v. Marcos*, No. 86-0207 (D. Haw. July 18, 1986); *Hilao v. Marcos*, No. 86-0390 (D. Haw. 1989). The author is counsel to plaintiffs in two individual actions, *Sison v. Marcos*, No. 86-0225 (S.D. Cal. filed June 30, 1986), and *Piopongco v. Marcos*. The suffering of the plaintiffs in these two cases is typical of that of all the plaintiffs. Jose Maria Sison, a leftist political leader and outspoken opponent of Marcos, was arrested in 1977. Immediately after his arrest, Marcos personally interrogated him. Sison was then subjected to water torture and other extreme physical abuse, including several days of beatings. This was followed by a seven-month period during which he was chained by one hand and one foot to a cot, denied the use of his

moved to dismiss the suits.³ In 1986, U.S. district court judges in Hawaii and California dismissed all the lawsuits on the ground that even if Marcos was responsible, the act of state doctrine barred U.S. courts from trying the cases.⁴ The dismissals were reversed by the Ninth Circuit Court of Appeals, which remanded the cases to the district courts to determine whether the lawsuits should be dismissed for any of the other grounds raised by the defendant.⁵ Plaintiffs' counsel then moved for pretrial consolidation of the lawsuits, which was granted. In January 1991—nearly five years after the lawsuits were filed—federal district court Judge Manuel Real, sitting in the district of Hawaii, denied Marcos's motion to dismiss on all grounds and ordered the parties to prepare for trial.⁶

The trial was bifurcated into liability and damages phases. The liability phases of all the cases were tried before a single six-member jury in September 1992. The jury found Marcos personally liable for most of the plaintiffs' torture, as well as for the loss resulting from the

eyeglasses, and confined in a small, suffocatingly hot room with no natural light. He spent the rest of his eight-and-a-half year detention in solitary or near-solitary confinement.

Francisco Sison, Jose Maria Sison's brother, was a member of Marcos's economic staff. Because he was a civil servant, Marcos could not fire him when Jose Maria became a political liability. Francisco, who had been under surveillance, disappeared in 1971. According to the family, he left one morning for Malacanang (the presidential palace) in a chauffeur-driven car. Francisco, the driver, and the car were never seen again. Local and federal police did not investigate the disappearance.

Jaime Piopongco was politically active in the Liberal Party and owned a radio station. Immediately after the declaration of martial law in September 1972, agents of Marcos searched his home and closed and destroyed his radio station. Piopongco hid until he was arrested in November. He was taken to Malacanang where he was held incommunicado, interrogated by high-ranking military officials, and subjected to mock executions. He was then transferred to Camp Crame where he was held until late December. He was released to house arrest and remained under armed surveillance in his own home until 1976, when he escaped and fled the country.

³ Marcos argued that he was immune from jurisdiction because he was either the *de jure* or the former president of the Philippines; the court lacked personal jurisdiction over him; the court lacked subject matter jurisdiction over the alien tort claims; plaintiffs lacked standing; plaintiffs failed to demonstrate a private right of action under international law; the lawsuits raised nonjusticiable political questions; the alleged acts were acts of state; plaintiffs' cause of action was barred by the statute of limitations; plaintiffs failed to exhaust their domestic remedies; and on the basis of *forum non conveniens*.

⁴ *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986); *Trajano v. Marcos*, No. 86-0207 (D. Haw. Oct. 31, 1986). The act of state doctrine is a judicially created doctrine that enables U.S. courts to refrain from examining the legality of the official acts of a foreign state on their own territory when doing so "might embarrass the Executive Branch of our Government in the conduct of our foreign relations." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976). *Accord International Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354 (9th Cir. 1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

⁵ *Trajano v. Marcos*, 878 F.2d 1438 (9th Cir 1989).

⁶ *Taking Tyrants to Court*, AM. LAW., Oct. 1991, at 56.

disappearance or murder of loved ones.⁷ At the end of 1993, the damages phase of the lawsuits was still pending.

Previous lawsuits against persons accused of torture, disappearance, and summary execution in other countries have been brought in U.S. courts; in some cases, large default judgments have been won.⁸ The Marcos litigation was the first lawsuit for human rights abuses in another country that was tried on its merits in a U.S. court.⁹ Despite Marcos's death in 1989, the lawsuits proceeded against his estate.

The trial offered plaintiffs their only opportunity to establish Marcos's accountability for human rights violations and to receive compensation for their suffering. Neither criminal nor civil proceedings against Marcos were possible in the Philippines because Philippine law required that a defendant be physically within the jurisdiction of the court when served.¹⁰ Even though Marcos, when he was alive, asserted his willingness to return to the Philippines and defend himself there, President Corazon Aquino refused to allow his repatriation.¹¹ Thus, although many of the plaintiffs reside in the Philippines and much of the evidence needed to prove his liability was there, U.S. courts were the only judicial fora with jurisdiction to hear human rights claims against Marcos.

Using the Marcos case as an example, this Article addresses whether justice and reparation can be achieved in United States courts for human rights abuses that occurred abroad. The process of restor-

⁷ In one case, the jury also found Marcos liable for the prolonged arbitrary detention of one of the plaintiffs.

⁸ *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984); *Martinez-Baca v. Suarez-Mason*, No. 87-2057 (N.D. Cal. Apr. 22, 1988); *Rapaport v. Suarez-Mason*, No. 87-2266 (N.D. Cal. Apr. 11, 1989); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

⁹ A second contested case, *Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 19, 1993), involving detention; torture; and cruel, inhuman, and degrading treatment and punishment in Ethiopia was tried in a two day trial in Atlanta in May 1993. The defendant was present and represented himself pro se. The three individual plaintiffs established that the defendant was responsible for their torture and mistreatment, and the court awarded them \$1,500,000 in compensatory and punitive damages.

¹⁰ "Extraterritorial service of summons under § 17 of Rule 14 of the Rules of Court (Philippines) is not available in personal actions and would not satisfy the constitutional requirement of due process under Philippine law." Declaration of Abelardo L. Aportadera, Jr., appended to Memorandum of Points and Authorities in (1) Response to Defendant's Reply Memorandum of Points and Authorities and (2) Response to Defendant's Supplemental Memorandum, *Sison v. Marcos*, No. 86-0225 (S.D. Cal. filed June 30, 1986). When actions against nonresident defendants do not affect the personal status of the plaintiff, Philippine courts have no power to enforce their processes beyond the territorial limits of the Philippines. MANUEL V. MORAN, *COMMENTS ON THE RULES OF COURT*, VOL. 1, at 456-57 (1979).

¹¹ Seth Mydans, *Marcos Indictment Will Aid Manila, Aquino Says*, N.Y. TIMES, Oct. 23, 1988, § 1, at 3.

ing justice to a society that has endured gross violations of human rights requires that the truth be revealed, that it be acknowledged publicly, that those who perpetrated the abuses be punished, and that the victims be rehabilitated and compensated.¹² When a rights-abusing government is ousted, it is the responsibility of its successor to restore justice by investigating and establishing a record of all abuses, and to make that record known so that a factual basis exists both for trying those alleged to be responsible and for aiding those who have suffered.¹³ The government also has a duty to the victims to ensure that they have an effective remedy via competent national tribunals for acts violating fundamental rights.¹⁴

II. REVEALING AND ACKNOWLEDGING THE TRUTH

From the start, the Marcos human rights litigation was handicapped because the Philippine government had never undertaken an investigation of the human rights abuses that occurred during the Marcos era.¹⁵ Nor did the Philippine government facilitate the investi-

¹² See generally, THE ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON (1989).

¹³ See, e.g., Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C, no. 4) at ¶ 174 (1988), reprinted in 28 I.L.M. 291 (1989). "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." *Id.*

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), reprinted in BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 298 (Burns H. Weston et al. eds., 1990) [hereinafter BASIC DOCUMENTS]. With respect to at least the most egregious violations of internationally recognized human rights—including torture, disappearance, and summary execution—an international consensus has emerged that the nation responsible must provide victims with reparations. See generally, Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1993/8 (1993); Nigel S. Rodley, *The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance*, in NEW DIRECTIONS IN HUMAN RIGHTS 167 (Ellen L. Lutz et al. eds., 1989). The Republic of the Philippines did not ratify the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), reprinted in BASIC DOCUMENTS, *supra*, at 376, until October 3, 1986—after Marcos's departure. The duty to provide an enforceable remedy under the provisions of that treaty are therefore not applicable. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 123, U.N. Doc. ST/LEG/SER.E/11 (1993).

¹⁵ Shortly after assuming office in early 1986, President Corazon Aquino appointed a Presidential Committee on Human Rights (PCHR) to investigate past and present abuses, and named highly respected former Senator Jose Diokno as its chair. LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMPUNITY: PROSECUTIONS OF HUMAN RIGHTS VIOLATIONS IN THE PHILIPPINES 19–20 (1991). Out of concern that early prosecutions might detract from other objectives of the human rights community and destabilize the new government before it had time to consolidate power, Diokno devised a strategy of preparing a handful of airtight "test cases" for prosecution. *Id.* at 20. Unfortunately, Diokno became terminally ill shortly after his appointment. After his death,

gation efforts of nongovernmental actors. Although Mrs. Marcos's shoes were placed on official display, government records and the personal knowledge of government officials that could expose the massive human rights abuses of the Marcos regime remain shrouded.¹⁶ The lack of governmental will to expose and acknowledge the truth impeded efforts to punish those responsible or provide an effective remedy to the victims. The passage of time dampened Philippine public enthusiasm for investing financial, political, and emotional capital to uncover and redress abuses of the Marcos era. Furthermore, redressing and preventing serious human rights abuses committed by the post-Marcos government seemed of greater urgency.¹⁷ Because the Philippine government acted neither quickly nor diligently to establish the truth, Marcos-era victims had no governmentally established factual foundation on which meaningful redress for their suffering could be based.

Victims needed to find a venue outside the political and cultural environment in which the abuses had occurred. The lawsuit was brought in a foreign forum where foreign substantive, procedural, and evidentiary rules applied. Even most of the actors in the trial were foreign—American lawyers argued the cases of Filipino human rights victims to an American judge and jury, before an American audience.¹⁸ Much of the plaintiffs' evidence consisted of the testimony of experts from American human rights organizations and the U.S. government. In addition, because of cultural and linguistic barriers, difficulties obtaining visas, and the expense of bringing Filipino witnesses to Hawaii, many Filipino victims testified via video deposition instead of

the PCHR failed to implement even Diokno's conservative strategy. *Id.* To date, only a handful of Marcos-era human rights abuses have resulted in convictions. No high level official in the Marcos administration has faced criminal charges, and the Philippine government has taken no steps to assess Marcos's liability for human rights abuses committed during his years in office. *Id.* at 57–58; Diane Orentlicher, *Discussion Paper: The Philippine Experience*, Presentation at the Aspen Institute for Humanistic Studies Conference on "State Crimes: Punishment or Pardon" (Nov. 4–6, 1988).

¹⁶ One popular explanation for the Aquino government's failure to aggressively investigate and prosecute Marcos-era human rights abuses was that doing so might lead to a coup by increasingly restive military officers. That several key members of Aquino's administration would have been inculcated by any serious human rights investigation also undoubtedly influenced her decision. Human rights investigations also were a casualty of the Aquino government's higher priorities, including weathering a series of coup attempts, waging war against the New People's Army, and proving that Marcos committed wholesale theft against the national treasury.

¹⁷ For examples of post-Marcos human rights abuse in the Philippines, see AMNESTY INTERNATIONAL, PHILIPPINES: THE KILLING GOES ON (1992); ASIA WATCH, PHILIPPINES: VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES (1990).

¹⁸ In *Sison v. Marcos*, No. 86–0225 (S.D. Cal. filed June 30, 1986), plaintiffs' counsel included one Filipino lawyer.

appearing in the courtroom. Consequently, only a handful of the more than ten thousand Marcos-era victims had their cases presented.¹⁹

While the task of revealing the truth was accomplished in the United States, there was no acknowledgement of the truth by the Philippine authorities. Nonetheless, many victims and their supporters present at the trial felt satisfaction that the truth at least had been acknowledged by a court. To some extent, other victims in the Philippines shared this sentiment once the press publicized the jury's finding of Marcos's liability.

III. PROSECUTING AND PUNISHING THE PERPETRATORS

The lawsuits brought against Marcos in the United States were civil, not criminal.²⁰ Even though the courts found Marcos civilly liable for human rights abuses, no criminal responsibility was attached to that finding. While his death made this issue moot, it was very much alive in the early years of these proceedings when many of the plaintiffs longed to see Marcos found guilty and punished for his crimes. Plaintiffs had hoped that in a civil trial before an impartial judge and jury, Marcos's accountability for the abuses they suffered would be established. Few believed, however, that even a large damages award would effectively punish Marcos. They cynically assumed that such a damages award would constitute only a small part of Marcos's hidden wealth, and that payment would cause him little hardship. They also worried—and continue to worry—that Marcos (or his estate) would find a way

¹⁹ See *Sison v. Marcos*, No. 86-0225 (S.D. Cal. filed June 30, 1986); *Trajano v. Marcos*, No. 86-0207 (D. Haw. July 18, 1986); *Hilao v. Marcos*, No. 86-0390 (D. Haw. 1989).

²⁰ When the Marcos litigation was filed, there was no universal jurisdiction to prosecute torturers. Since that time, however, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter Convention Against Torture] entered into force. G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987), *reprinted in* 23 I.L.M. 1027 (1984). The Convention Against Torture requires that states make torture a punishable offense when it is committed within their territory, by their nationals, or against their nationals. *Id.* In addition, in the absence of such a link, states must exercise universal jurisdiction over any torturers found within their jurisdiction and either try them or extradite them to a country that will. *Id.* In 1990, the United States Senate gave its advice and consent to ratification of the Convention Against Torture. S. TREATY DOC. No. 100-20, 101st Cong., 2d Sess. (1990), *in* 136 CONG. REC. D1436, D1442. After the U.S. Congress passes the implementing legislation (currently contained within the Violent Crime Control and Enforcement Act, H.R. 3355, 103d Cong., 1st Sess. (1993)), the United States will deposit its articles of ratification to the treaty with the United Nations Secretariat. Thereafter, foreign public officials who directly inflict, instigate, consent to, or acquiesce to torture would be subject to criminal prosecution or extradition if they came to the United States. *Id.*

to place his assets beyond the reach of the U.S. court so that little or no money could be collected.

Because U.S. foreign sovereign immunity law barred the plaintiffs from naming the Republic of the Philippines as a defendant,²¹ plaintiffs had sued Marcos only in his individual capacity.²² The fact remains that the Republic of the Philippines should bear some responsibility for the gross violations of human rights suffered by its people. Furthermore, many individuals besides Marcos share responsibility for the atrocities committed during his regime. In filing their lawsuits, however, plaintiffs restricted their claims to those individuals over whom a U.S. court could obtain jurisdiction. Thus, even though Marcos was found liable, the Philippine government and most of the other individuals who share responsibility for the atrocities avoided liability altogether.

IV. PROVIDING REPARATION FOR THE VICTIMS

Even though plaintiffs prevailed in establishing Marcos's liability, major hurdles still lie ahead in establishing the amount of damages. Moreover, money is the only form of reparation plaintiffs can seek. Many of the remedies the Philippine government could have offered lie outside a U.S. court's authority to order.²³

²¹ 28 U.S.C. § 1605 (1993).

²² Many of the original complaints also named General Fabien Ver, who was Marcos's chief of staff and who traveled to the United States with the Marcos family. Ver fled the United States before process could be served and his whereabouts are still unknown.

One of the lawsuits, *Trajano v. Marcos*, named Imee Marcos, Ferdinand Marcos's daughter, as an additional defendant, and the court obtained personal jurisdiction over her. Ms. Marcos failed to answer the complaint and the court entered a default judgment of \$4,161,000 against her. The Ninth Circuit Court of Appeals sustained the default judgment. *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993).

²³ These remedies include restoration of confiscated property; restoration of lost jobs; medical, psychological, or other counseling services; special education or job training benefits for victims and their children; and commemorative symbols or events.

At the forty-fifth session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur Theo van Boven submitted his final report in a study concerning the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms. See Boven, *supra* note 14. That report contained proposed basic principles and guidelines concerning reparation that included the following forms of reparations:

8. *Restitution* shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.

9. *Compensation* shall be provided for any economically assessable damage resulting from human rights violations, such as:

- (a) Physical or mental harm;
- (b) Pain, suffering and emotional distress;

The Philippine government did express its support for the human rights litigation against Marcos in the United States.²⁴ One could construe this support as a step by the government towards fulfilling its international human rights obligations. Nevertheless, by not providing a reparations mechanism of its own, the government denied Filipino victims any guarantee that their claims would be satisfied. Moreover, the Philippine government has made its own claims on the assets controlled by Marcos's estate.²⁵ Consequently, victims of human rights abuses fear that their reparation claims will be trumped by those of a government, which is not only responsible for their suffering, but which has provided no means of redress.

V. CONCLUSION

The result achieved in the Marcos litigation falls short of the model of justice that has evolved under international law. The Philip-

- (c) Lost opportunities, including education;
- (d) Loss of earnings and earning capacity;
- (e) Reasonable medical and other expenses of rehabilitation;
- (f) Harm to property or business, including lost profits;
- (g) Harm to reputation or dignity;
- (h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

10. *Rehabilitation* shall be provided, to include legal, medical, psychological and other care and services, as well as measures to restore the dignity and reputation of the victims.

11. *Satisfaction and guarantees of non-repetition* shall be provided, including:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth;
- (c) A declaratory judgement in favour of the victim;
- (d) Apology, including public acknowledgment of the facts and acceptance of responsibility;
- (e) Bringing to justice the persons responsible for the violations;
- (f) Commemorations and paying tribute to the victims;
- (g) Inclusion of an accurate record of human rights violations in educational curricula and materials;
- (h) Preventing the recurrence of violations by such means as:
 - (i) Ensuring effective civilian control of military and security forces;
 - (ii) Restricting the jurisdiction of military tribunals;
 - (iii) Strengthening the independence of the judiciary;
 - (iv) Protecting the legal profession and human rights workers;
 - (v) Providing human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

Id. at 57-58.

²⁴For example, the Republic of the Philippines filed an amicus curiae brief in the Ninth Circuit Court of Appeals in February 1987, urging that the Court allow the human rights cases against Marcos to proceed on the merits.

²⁵*See, e.g., Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989).

pine government has sidelined itself from the process, and legal and procedural barriers hindered efforts to prosecute Marcos or seek the most appropriate forms of reparation. On the other hand, the Marcos litigation achieved a greater sense of justice than has ever been possible before. Although the result was a compromise, it was a welcome one. This was especially true for the individual plaintiffs who told their stories in a court of law. The normal aftereffects of traumatic human rights abuse—such as mistrust, shame, and the desire to bury the past—had prevented many of them from sharing their experience with others, or even facing their pasts themselves.²⁶ Testifying required not only revealing their past, but stating it publicly in a formal and foreign environment. Therefore, there was a sense of relief as well as a sense of justice when the court announced its verdict.

The liability judgement against Marcos was heralded in the Philippines as a major advancement in revealing the existence of human rights abuses during the Marcos era. The verdict prompted Philippine human rights groups, which formerly had played only a supporting role in the litigation, to become more actively involved. The efforts of these groups became essential in the process of identifying class members and encouraging them to submit damages claims.

For many of the victims, however, more than twenty years have passed since their torture or mistreatment. They are getting older and would like to see justice and reparations in their lifetimes. Although Marcos's liability was established in 1992, more than a year after the conclusion of the trial the damages phase has yet to be completed. Even when this phase is concluded, it is likely to be followed by years of appeals before plaintiffs can try to enforce their judgment. The Marcos family has demonstrated its ability to conceal assets, and the Philippine government has made clear its intent to recover for itself whatever assets can be found. Thus, the plaintiffs may be unable to collect any damages award that the court eventually declares.

Despite these obstacles, the lawsuit was the only avenue available for the plaintiffs to seek justice. Their need for justice outweighed the procedural and legal hindrances they faced. Although they may not be financially compensated for the abuses they suffered, they have won at least some of the justice that they sought.

²⁶ For additional information on the long-term aftereffects of torture and other traumatic human rights abuses, see GLENN R. RANDALL & ELLEN L. LUTZ, *SERVING SURVIVORS OF TORTURE* (1991).

